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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARK PENNINGTON,

Plaintiff and Appellant,

v.

ALLAN SCHULZE, et al,

Defendants and Respondents.

2d Civil No. B232349
(Super. Ct. No. 56-2008-00331536)
(Ventura County)

In this personal injury action, Mark Pennington appeals from the judgment entered in favor of respondents Alan Schulze, Realco Properties, Ltd., and Westridge Management. Judgment was entered after a jury returned a special verdict. It found respondents negligent but that this negligence was not a substantial factor causing appellant's harm. Appellant was struck by a piece of molding that fell from a building owned and managed by respondents. In the trial court, appellant claimed that the molding fell because of respondents' negligence. He also claimed that their negligence was a substantial factor in causing his severe medical problems.

Appellant contends that the trial court erroneously refused to instruct the jury that respondents had a non-delegable duty to both maintain *and put* the building in a reasonably safe condition. Instead, the court instructed that respondents had a non-delegable duty only to maintain the building. We conclude that the trial court's

instruction was erroneous, but the error did not prejudice appellant. Accordingly, we affirm. We dismiss respondents' protective cross-appeal as moot.

Facts - The Incident

Realco Properties, Ltd. (Realco) is a family partnership that owns commercial real estate. Alan Schulze is a limited partner and managing agent for the partnership. Realco's properties are managed by Westridge Management. Schulze testified that he is "in charge" of Westridge Management.

In 1998 or 1999, a fire damaged one of Realco's properties on Main Street in the City of Ventura. Realco contracted with J.F. Dapra, Inc. (DaPra), a licensed general contractor, to repair and renovate the two-story building. The renovation included the installation of concrete molding on the front of the building.

Three levels of molding were installed: base molding at ground level, mid-band molding, and cornice molding at the top of supporting columns. DaPra subcontracted the molding installation to Precast by VSI.

The renovation of the building was completed in September 2000. In 2006 Schulze noticed that a piece of base molding had become detached from the building. The piece had not been mechanically fastened. Schulze spoke to a friend who was a general contractor. According to Schulze, the friend said that he "should just stick it back on with some thin set [an adhesive material]." The friend testified that Schulze had said that a piece of the base molding was cracked.

On March 9, 2008, appellant was leaning against one of the building's columns when a piece of the column's cornice molding fell and struck him on the left shoulder, (hereafter referred to as "the incident.") Dax Rooks was parked across the street from the building. He heard a crashing noise and ran toward appellant, who "was sitting down in a doorway." Rooks noticed that a "masonry facade [cornice molding]" had fallen from the top of a column, had "struck [a] sign, and . . . had broken apart coming down onto the ground." Rooks looked at the top of a column that was "adjacent" to the one from which the cornice molding had fallen. He noticed that "half of the front [cornice] molding" on the adjacent column was also "missing." Schulze, on the other

hand, testified that he had removed the missing cornice molding from the adjacent column after the incident. But Rooks was "absolutely certain" that the missing cornice molding on the adjacent column was missing when the incident occurred.

Shortly after the incident, Schulze asked Christopher Karbum to inspect the molding. Karbum had expertise in the installation of precast concrete. Karbum concluded that there had been "no proper preparation to attach the molding. They just attached it right over the existing plaster." Although there were mechanical attachments for the mid-band molding, no such attachments existed for the cornice or base molding The cornice molding should have been mechanically attached to the building. "Any little earthquake . . . is going to shake this stuff off, if it's not attached properly . . . ." Furthermore, rebar had been improperly placed inside the molding, and the rebar had not been coated to prevent rusting. Karbum opined that all of these factors had led to the failure of the piece of molding that struck appellant.

Karbum saw cracks in the molding. They were "readily visible" "[o]n the base pieces especially. Down low where the rebar was too close to the surface of the casting, it was rusting and cracking." The base moldings "were cracking so bad they looked like they were ready to come off." The severe cracking and rusting indicated that the molding "was not properly made."

Another expert, John Springman, explained the danger of rusting rebar: "[O]nce the rebar rusts, the rust actually causes expansion. And then the concrete will start to crack. And then it could debond and fall like it has or crack and pieces come off. . . . [I]t starts its failure mode once the rust starts." Springman noted that the piece of molding that fell contained rusted rebar.

When Karbum knocked on the cornice moldings, "[t]hey sounded hollow." When Karbum removed some of the pieces of the cornice molding, they "came off real easy." Karbum replaced the base and cornice molding. He did not replace the mid-band molding because it had been properly fastened.

Facts - Medical

In November 2007, a few months before the incident, appellant consulted a neurosurgeon, Dr. Moustapha Abou-Samra. Appellant complained that he had pain in his neck that was radiating to his right shoulder and down his right arm. On February 26, 2008, Dr. Abou-Samra performed surgery on appellant's neck. The surgery relieved appellant's symptoms.

Prior to Dr. Abou-Samra's surgery, appellant had a history of medical problems and surgeries. Appellant had "thoracic outlet syndrome in 1999," a "carpal tunnel release in 1995," an "ulnar nerve decompression in 1996, tennis elbow treatment [in] 2005, and radial nerve surgery in 2007."

Appellant saw Dr. Abou-Samra on March 14, 2008, five days after the incident and 16 days after the surgery. Appellant complained that, as a result of the incident, he had started having pain in his left shoulder and neck. Appellant "said the pain was terrible." But an x-ray and MRI scan were negative. Dr. Abou-Samra opined that "the x-rays and the MRI scan just don't suggest there is a problem" with appellant's cervical spine. Dr. Abou-Samra also ordered an EMG study that was "negative for signs of injury from [the] incident." Dr. Abou-Samra examined appellant's left shoulder and did not detect a problem. He "ruled out an anatomical structural problem as well as a nerve involvement problem." The "only conclusion" that Dr. Abou-Samra "could reach" was that appellant had "a pain syndrome that could be coming from his muscles."

Appellant claimed that, when he was struck by the piece of molding, "his life was fundamentally changed forever." He had "[l]ots of pain in [his] neck radiating down into" his left shoulder and arm. Dr. Samuel Ahn performed left thoracic outlet surgery. That surgery relieved some, but not all, of appellant's symptoms. He was "[s]till having pain in the neck radiating down onto the top part of the shoulders." Appellant underwent numerous medical procedures for the pain. But since the incident, there has not been "a point in time" when he was "pain free."

In September 2009, after Dr. Ahn's surgery, appellant saw Dr. Sheldon Jordan. He was complaining of "mostly headache, neck pain, shoulder pain." Dr. Jordan observed that appellant had "degenerative changes in his neck" that predated the incident. He opined that appellant's problems were due to a combination of these degenerative changes and the incident. But it was the incident that had triggered appellant's "chronic pain syndrome." Dr. Jordan was aware that, before the incident, appellant "had numerous problems with various nerve conditions in his upper extremities that led to multiple surgeries."

Shortly after the incident, appellant saw Dr. Mark Montgomery. Dr. Montgomery examined appellant and noticed that there was swelling and tenderness "where the nerves travel or transition from the neck to the shoulder." Dr. Montgomery opined that, as a result of the incident, appellant "had an aggravation of his thoracic outlet [problem]."

Respondents called doctors to testify on their behalf. Dr. Michael Wienir testified that, when appellant went to the emergency room after the incident, "he was a neurologically normal man who had sustained a trauma to the shoulder area with bruising and abrasions." There was "[n]o evidence of any kind of nerve injury."

Dr. Hillel Sperling opined that the incident had not caused the need for Dr. Ahn's left thoracic outlet surgery on appellant: "He'd already had right thoracic outlet syndrome surgery before this. And even back then he was diagnosed with the other side." Dr. Sperling testified that, as a result of the incident, appellant had sustained a neck sprain and "possibly . . . a contusion around the area of his shoulder blade."

Instruction on Nondelegable Duty

Appellant requested that the trial court give a modified version of CACI No. 3713. The proposed instruction provided in part that respondents had a nondelegable duty pursuant to which they "were responsible for putting and maintaining the building and the premises in a reasonabl[y] safe condition." The instruction made clear that the term "putting" included the actual installation of the molding.

The instruction given by the trial court omitted the term "putting." The instruction indicated that respondents' liability could be predicated only on a nondelegable duty to maintain the building in a reasonably safe condition. The trial court declared: "[T]he nondelegable duty is one regarding the maintenance of real property. So the instruction 3713 regarding the elements of that obligation and duty will be in terms of maintenance." The trial court concluded that respondents did not have a nondelegable duty to properly install the molding because the entity that had performed the work was "two steps removed" from respondents. The first step was the general contractor, DaPra. The second step was the subcontractor hired by DaPra, Precast by VSI. The trial court stated: "[T]hat second step of removal is not present in any of the cases that talk about nondelegable duty that have been offered to me." Therefore, respondents' "nondelegable duty does not reach to the firm that did the actual installation of the molding."

Appellant contends that the trial court erroneously refused to instruct that respondents had a nondelegable duty to both maintain and put the building in a reasonably safe condition. Appellant asserts: "[T]he trial court's decision to limit the non-delegable duty instruction [to maintenance of the building] deprived [him] from putting before the jury the theory that Schulze also had the duty to put the building in a reasonably safe condition. Appellant's argument has merit.

"The employer of an independent contractor is ordinarily not liable to third parties for the contractor's negligence. [Citation.] However, the general rule is subject to exceptions of such magnitude that they leave only a small area in which the common rule operates. [Citation.] In fact, the exceptions have almost emasculated the general rule. [Citation.]" (*Widman v. Rossmoor Sanitation, Inc.* (1971) 19 Cal.App.3d 734, 743; see also *Privette v. Superior Court* (1993) 5 Cal.4th 689, 693 ["Over time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that ' " 'the rule is now primarily important as a preamble to the catalog of its exceptions' " ' "].)

One exception to the general rule of nonliability is the doctrine of peculiar risk. Pursuant to this doctrine, "a person who hires an independent contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 256.) Respondents correctly observe that the peculiar risk doctrine does not apply here. But respondents are wrong in arguing that no other exception is applicable.

The general rule of nonliability has another exception that does apply here: the doctrine of nondelegable duties. " 'A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor.' [Citation.]" (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146.) "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' [Citation.]" (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726; see also dictum in *Fanjoy v. Seales* (1865) 29 Cal. 243, 250 ["If the cornice had been so insufficiently fastened to the wall when the [owner] accepted the house [from his contractors] as finished, as to break away from [the wall] by its own weight, and in its fall had injured a passer-by on the sidewalk beneath, there would be no doubt in such case of the [owner's] liability"].)

"[T]he nondelegable duty rule is a form of vicarious liability because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a nondelegable duty is '*held liable for the negligence of his agent,* whether his agent was an employee or an independent contractor.' [Citation.] Regardless of ' "how carefully" ' the landowner selected the independent contractor, the landowner ' "*is answerable for harm caused by the negligent failure of*

his contractor[.]" ' [Citation.]" (*Srithong v. Total Investment Co., supra*, 23 Cal.App.4th at p. 727.)

It matters not whether the harm was caused by the negligent conduct of a general contractor selected by the landowner or, as here, by the negligent conduct of a subcontractor selected by the general contractor. In the latter case the landowner is still answerable for the harm because the negligence of the subcontractor is imputed to the general contractor, and the landowner is responsible for the general contractor's negligence. The general contractor "has supervision over the entire building and its construction, including the work performed by a subcontractor, and where he negligently creates a condition, either by himself or through a subcontractor, he is primarily responsible for that condition and the consequences that may follow from it. He is in full control of the construction and knows or should know what is being placed in the building." (*Dow v. Holly Mfg. Co.* (1958) 49 Cal.2d 720, 725; see also *Sabella v. Wisler* (1963) 59 Cal.2d 21, 28 ["As the general contractor[,] Wisler is held responsible for the defectively laid plumbing even though the work might have been completed by a subcontractor"]; *Muth v. Urricelqui* (1967) 251 Cal.App.2d 901, 907 ["Muths, as the owners of the tract and the general contractors, could not escape liability for the damage to the Hacklers by seeking refuge in the defense that the damages were proximately caused by the negligence of one or more of their subcontractors"]).

"Restatement Second of Torts, Section 422, frequently applied in California" (*Pappas v. Carson* (1975) 50 Cal.App.3d 261, 268), imposes liability on the landowner for acts of "independent contractors" without drawing a distinction between general contractors and subcontractors: "A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure (a) while the possessor has retained possession of the land during the progress of the work, or (b) after he has resumed

possession of the land upon its completion." (See also *Knell v. Morris* (1952) 39 Cal.2d 450, 456 ["It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition. See Rest., Torts, § 422."]; *Maloney v. Rath* (1968) 69 Cal.2d 442, 447 ["we have found nondelegable duties in a wide variety of situations and have recognized that the rules set forth in the Restatement of Torts with respect to such duties are generally in accord with California law"].)

Respondents' nondelegable duty, therefore, was not limited to maintaining the building in a reasonably safe condition. Respondents also had a nondelegable duty to put the building in a reasonably safe condition, and the trial court erred in refusing to so instruct the jury. Respondents were not relieved of this duty because DaPra, the general contractor, entrusted the installation of the molding to a subcontractor.

We reject respondents' contention that a nondelegable duty instruction is improper here because there is no statutory authority for a property owner's duty to put and maintain his property in a reasonably safe condition. The duty is founded in the common law, so no statutory authority is necessary.

Prejudice

Having determined that it was error to refuse to instruct that respondents' liability could be predicated on a nondelegable duty to put the building in a reasonably safe condition, "we must decide whether the error was so prejudicial as to require reversal. [¶] Under article VI, section 13 of the California Constitution, if there is error in instructing the jury, the judgment shall be reversed only when the reviewing court, 'after an examination of the entire cause, including the evidence,' concludes that the error 'has resulted in a miscarriage of justice.' Under the Constitution, we must determine whether it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. [Citation.]" (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1054.)

" '[O]ur standard of review . . . is the opposite of the traditional substantial evidence test. " '[I]n assessing an instruction's prejudicial impact, we cannot use the

view of the evidence and inferences most favorable to the [prevailing party]. [Citations.] Instead, we must assume the jury might have believed [appellant's] evidence and, if properly instructed, might have decided in [appellant's] favor. [Citations.]' [Citation.] Accordingly, we state the facts most favorably to the party appealing the instructional error alleged[.] [Citation.]" [Citation.]' [Citations.]" (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304.)

"Prejudice from an erroneous instruction is never presumed; it must be affirmatively demonstrated by the appellant. [Citation.]" (*Wilkinson v. Bay Shore Lumber Co.* (1986) 182 Cal.App.3d 594, 599.) Appellant has failed to carry his burden of affirmatively demonstrating prejudice. In its special verdict, the jury found that respondents were "negligent in the use or maintenance of the property." But judgment was rendered for respondents because the jury also found that their negligence was not "a substantial factor in causing harm to [appellant]." As to the meaning of "substantial factor," the jury was instructed: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. . . . [¶] Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." It is reasonable to infer that the jury found that respondents' negligence was not a substantial factor in causing harm because the incident was not a substantial factor in causing appellant's medical problems.

Viewed in the light most favorable to appellant, the evidence shows the following: In 2006 Schulze noticed that a piece of base molding had become detached from the building. The piece, which was cracked, had not been mechanically fastened. Immediately after appellant was struck by the falling cornice molding, Dax Rooks looked at the top of a columm that was adjacent to the one from which the molding had fallen. He noticed that a piece of cornice molding on the adjacent column was also missing. When Christopher Karbum inspected the building, he saw cracks in the molding. They were "readily visible" "[o]n the base pieces especially. Down low where the rebar was too close to the surface of the casting, it was rusting and

cracking." The base moldings "were cracking so bad they looked like they were ready to come off."

During closing argument, appellant's counsel stated that, if Schulze had "properly maintained and inspected the . . . property, he would have been aware of the piece [of cornice molding] . . . that Mr. Dax Rooks testified . . . was missing [from the top of the adjacent column]." Schulze also would have been aware of the severe cracking of the base molding and the rusting of the rebar observed by Karbum. Schulze's discovery in 2006 of the cracked and detached piece of base molding should have alerted him to the need to monitor the condition of the molding.

In view of the obvious problems with the molding, especially the missing piece of cornice molding, a reasonable owner of the building would have had the molding inspected by an expert, such as Karbum. Any competent expert would have reached the same conclusion as Karbum: the cornice molding needed to be replaced because it had been improperly made and installed.

Thus, if respondents had not been negligent in maintaining the building, they would have taken remedial measures that would have prevented the incident from occurring. Accordingly, if the jury had concluded that the incident had been a substantial factor in causing appellant's medical problems, it is reasonable to infer that the jury also would have concluded that respondents' negligent maintenance of the building had been a substantial factor in causing harm to him. The molding fell not only because it had been improperly made and installed, but also because respondents had failed to properly maintain it.

We therefore may reasonably infer that the jury found that the incident was not a substantial factor in causing appellant's medical problems. Ample evidence supports this finding. Appellant had pre-existing medical conditions. As noted by appellant's expert witness, Dr. Jordan, before the incident appellant "had numerous problems with various nerve conditions in his upper extremities that led to multiple surgeries." Appellant's neurosurgeon, Dr. Abou-Samra, did extensive testing to determine whether the blow to appellant's left shoulder had injured him. All of the tests were negative.

Dr. Abou-Samra found nothing wrong when he examined appellant's left shoulder. He "ruled out an anatomical structural problem as well as a nerve involvement problem." Dr. Wienir opined that, when appellant went to the emergency room after the incident, "he was a neurologically normal man who had sustained a trauma to the shoulder area with bruising and abrasions." There was "[n]o evidence of any kind of nerve injury." According to Dr. Sperling, the incident had not caused the need for Dr. Ahn's left thoracic outlet surgery. Dr. Sperling opined that, as a result of the incident, appellant had sustained a neck sprain and "possibly . . . a contusion around the area of his shoulder blade."

Thus, if the trial court had correctly instructed the jury that respondents' liability may be predicated upon a duty to both put and maintain the building in a reasonably safe condition, it is not reasonably probable that the outcome would have been more favorable to appellant. Assuming that the jury would have found respondents liable for the subcontractor's negligent installation of the molding, it is not reasonably probable that the jury would have found that negligence to have been a substantial factor in causing appellant's medical problems.

Disposition

The judgment is affirmed. Respondents' protective cross-appeal from the judgment is dismissed as moot. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Henry J. Walsh, Judge

Superior Court County of Ventura

Kenneth R. Brown; Law Offices of Cho & Brown and Gary M. Schumacher for Appellant.

Haffner, Haffner & Kirwin; Mathew M. Haffner and Brian S. Dewey, for Alan Schulz; Westridge Management and Realco Properties, Respondents.

Prindle, Amaro, Goetz, Hillyard, Barnes & Reinholtz; Jack R. Reinholtz and Cyhthia A. Palin, for J. F. Dapra, Inc., Respondent.